SUPREME COURT, U. S.

Supreme Court, U. S.
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Supreme Court

of the

United States

NO. 74-640

ECONOMIC RESEARCH ANALYSTS, INC. and RICHARD W. McINTYRE,
Petitioners,

vs.

DANIEL O'CONNELL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ECONOMIC RESEARCH ANALYSTS, INC.
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The Petitioners, ECONOMIC RESEARCH ANALYSTS, INC. and RICHARD W. McINTYRE, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in these proceedings on August 26, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix B, p. 4, *infra*) is reported at 499 F. 2d 994. The Findings of Fact and Conclusions of Law of the United States District Court of the Southern District of Florida (Miami Division) was not published or incorporated into a reported opinion, and they are set forth in Appendix C (p. 7, *infra*).

JURISDICTION

The Order or Judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 26, 1974. (Appendix A, p. 4, *infra*). The Petition was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1); and pursuant to Rule 19.1(b), Supreme Court Rules. The Court of Appeals, Fifth Circuit, has decided an important question of Federal law which has not been, but should be, settled by this Court.

QUESTIONS PRESENTED

I

WHETHER OR NOT RESPONDENT'S OWN CONDUCT PRIOR TO THE INSTITUTION OF THESE PROCEEDINGS (HE HAD ALREADY OBTAINED IN STATE COURT SUBSTANTIALLY ALL OF THE RELIEF HE SOUGHT IN FEDERAL COURT.) REQUIRES THAT A FEDERAL COURT DENY HIM THE PRIVILEGE OF PENDENT JURISDICTION BECAUSE APPLICATION OF THE DOCTRINE IN THIS SITUATION WOULD DO VIOLENCE TO THE VERY PRINCIPLES UPON WHICH IT IS GROUNDED: JUDICIAL ECONOMY, CONVENIENCE, AND FAIRNESS TO LITIGANTS.

II

WHETHER OR NOT AN AGENT'S TORTS COMMITTED SOLELY FOR HIS OWN PURPOSES ARE COMMITTED WITHIN THE SCOPE OF HIS EMPLOYMENT.

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2 of the United States Constitution provides in pertinent part as follows:

> Section 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States . . .

STATUTES AND REGULATIONS INVOLVED

1. Title 15, U.S. Code—§78j Provides in pertinent part as follows:

> "*Manipulative and deceptive devices.*
>
> "It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> "(a) . . . . . .
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors"

2. Securities Exchange Commission Rule 10b-5.

"*Employment of Manipulative and Deceptive Devices*

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

"(1) to employ any device, scheme, or artifice to defraud,

"(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

3. Florida Statutes 517.301

"*Fraudulent transactions; falsification or concealment of facts.*— It is unlawful and a violation of the provisions of this chapter, for any person:

"(1) in the sale or purchase of any security in this state, including any security exempted under the provisions of §517.05, and including

any securities sold in any transaction exempted under the provisions of §517.06, directly or indirectly:

"(a) To employ any device, scheme or artifice to defraud;

"(b) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made not misleading;

"(c) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security.

"(2) To publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, communication or broadcast which though not purporting to offer a security for sale, describes such security for a consideration received or to be received directly or indirectly from an insurer, underwriter, or dealer, or from an agent or employee of an insurer, underwriter or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

"(3) In any matter within the jurisdiction of the department to knowingly and willfully

falsify, conceal or cover up by any trick, scheme, or device, a material fact, or make any false, fictitious or fraudulent statement or representation, or make or use any false writing or document, knowing the same to contain any false, fictitious or fraudulent statement or entry."

STATEMENT OF THE CASE

The Petitioners herein are Economic Research Analysts, Inc. ("ERA"), a registered broker/dealer, and Richard W. McIntyre ("McIntyre"), the Chief Executive of ERA. The Respondent, Daniel O'Connell ("O'Connell"), was granted a judgment against ERA and McIntyre for violations of Section 10(b) of the Securities Exchange Act of 1934, as amended, (15 U.S.C. Section 78j (b)) (the "Exchange Act") and Rule 10b-5 promulgated thereunder and for having perpetrated fraud as a matter of law. As shall be set forth with more particularity below, the gist of Respondent's Complaint was that Richard F. Petersen ("Petersen"), a registered representative of ERA, perpetrated a fraud upon him in connection with the sale of certain securities.

In September of 1969, Respondent filed an action in the Circuit Court of the Eleventh Judicial Circuit of Florida, in and for Dade County, Florida against Marine Environmental Data, Inc., Francis C. Gibout, Richard F. Petersen, and Ann H. Petersen seeking recovery for violations of his rights under the "securities laws" and the anti-fraud provisions of the Florida common law in connection with the offer and sale of securities of a mutual fund known as Colonial Ventures,

a corporation called Stacey-Gifford Company, and a corporation called Marine Environmental Data, Inc. (Appendix D., p. 24, *infra*) On February 7, 1972 he obtained a Final Judgment by Default for $11,800. (Appendix E., p. 32, *infra*) The Petitioners were not named or mentioned in this Complaint.

Then, on April 27, 1972, Respondent filed a Complaint in the United States District Court for the Southern District of Florida seeking recovery against the Petitioners for violations of his rights as protected by Section 10b of the Exchange Act and by the anti-fraud provisions of the Florida common law.

At trial, Respondent testified that on August 12 and September 12, 1968, he purchased 200 and 350 shares, respectively, of Common Stock in the Stacey-Gifford Company ("Stacey-Gifford") from Petersen being unadvised that the shares he would ultimately receive would once have belonged to Defendant McIntyre. While Petersen's application to become registered with ERA had been approved by the Securities Commission of the State of Florida and the National Association of Securities Dealers, Inc. ("NASD") some time in August 1968, Petersen did not become effectively registered with ERA until September 13, 1968. On that date he was mailed a letter from ERA advising him that he had been assigned an ERA registered representative's code number. Without this code number, he could not make sales on behalf of ERA. Therefore, the 200 and 350 shares of Stacey-Gifford were purchased by the Plaintiff before Petersen was actually an operating registered representative of ERA. Even though the mere delivery of these shares occurred later, McIntyre testified that he told the Plaintiff on the telephone that he would

receive shares which had previously been owned by McIntyre. McIntyre asked him for registration instructions as there was some confusion as to in whose name they would be registered. The Trial Judge found differently.

Beginning in early 1968, the Respondent had begun to purchase the Stacey-Gifford stock from Petersen. These transactions, as well as certain of those which occurred between the Plaintiff and Petersen after Petersen had become registered with ERA, took place at Petersen's own offices or in the home of either Petersen or the Respondent. The checks issued by the Plaintiff for these purchases, as well as for all the other purchases giving rise to this cause of action, were issued to the order of Petersen, individually, not to ERA, and they were endorsed by Petersen or his own firm, not ERA.

The evidence also indicated that Respondent continued to buy stock in Stacey-Gifford after July of 1969, which was the date that he began to suspect that something was "wrong" with respect to the transactions between himself and Petersen. In that connection, the Respondent testified that he did not care from where these securities came. Moreover, the price which Respondent paid for these securities had declined from $6 per share to $2 and then to $1 per share.

The evidence indicated that on January 28, 1969, the Respondent agreed to purchase an as yet then undetermined number of shares of Colonial Ventures, and in connection therewith gave Petersen a check for $3,000 payable to the order of Petersen, not ERA. Petersen testified, and there was no evidence in rebut-

tal, to the effect that the Respondent was aware that at the time the purchase price was paid, Colonial Ventures was not in existence, and would be "forthcoming". Petersen testified that he had financial difficulties at the time and although he did not intend to defraud the Respondent, since the mutual fund was not yet in existence, he suggested to the Respondent that he (O'Connell) use the Colonial Ventures money together with $7,000 to buy shares in a new company being formed to capitalize on the then current craze for pollution-control equipment, said company being Marine Environmental Data, Inc. ("Marine Environmental"). Petersen explained that he made it quite clear to the Respondent that he would not be buying the stock of Neurus Corporation ("Neurus"), but that he would be participating in a private placement of securities of a new company. Petersen explained that Marine Environmental had an affiliation with Neurus as its sales arm in Florida, the technical founders and principals of Neurus being unable to market their own product. He told the Respondent that the only securities connection between the two companies would be that should Marine Environmental be successful, it would be granted stock options to purchase the stock of Neurus.

The Respondent testified that he had agreed to buy Neurus, and the Trial Judge agreed.

On March 18, 1969, the Respondent agreed to purchase 300 shares of Stacey-Gifford. This $1,800 was converted by Petersen to his own use, and these shares of Stacey-Gifford were never delivered by Petersen to the Respondent.

As stated earlier, all of the checks issued for payment of the aforementioned securities were made to the order of Petersen or his own company. In addition, the Respondent never had an account with ERA, he received no confirmation slips from ERA with respect to his transactions, nor did he ever receive a monthly statement of account from ERA.

In conclusion, the evidence indicated that Respondent never had an account with ERA and that in dealing with Petersen, the Plaintiff was dealing with him as an individual and not as an agent of ERA. Moreover, since Respondent discovered the fraud in June of 1969, but filed his Complaint on April 27, 1972, his action was barred by the Statute of Limitations, since the Complaint was filed more than two years after the fraud was discovered.

Petitioners moved to dismiss Respondent's District Court Complaint on the grounds that the Federal claim was barred by the statute of limitations; that the Complaint did not state a cause of action for common law fraud; and that should the federal claim be denied, the state claim should fall for lack of jurisdiction, there being no diversity of citizenship between the parties. This motion was denied.

After the trial, Petitioners appealed to the United States Court of Appeals for the Fifth Circuit. Shortly before, a case virtually identical to Respondent's (*Cyril M. Hudak v. Economic Research Analysts, Inc. and Richard W. McIntyre*) was brought in the Southern District of Florida. This case was also decided adversely to the Petitioners, and this Judgment was also appealed. The two appeals were then consolidated for oral argument.

On appeal, the Fifth Circuit ruled that both Federal claims were barred by the statute of limitations applicable to 10b-5 litigation in Florida. However, this particular cause was reversed and remanded to the District Court for a determination of whether or not the District Court had determined to hear the pendent claim (which would not be barred by the statute of limitations applicable to it) and, if so, to permit the District Court to make such specific findings. The Findings of Fact and Conclusions of Law were held to be ambiguous on this point. The *Hudak* judgment, as a practical matter, however, stood, because notwithstanding the failure of the Federal claim, the Fifth Circuit upheld the District Court's assumption of pendent jurisdiction by sustaining the State claim for Florida common law fraud.

REASONS FOR GRANTING THE WRIT

I. PENDENT JURISDICTION

Perhaps recognizing that the doctrine of pendent jurisdiction is not absolute and beyond reproach, Justice Brennan, speaking for the majority in *United Mineworkers of America v. Gibbs*, 383 U.S. 715 (1966) emphasized that the doctrine is one of discretion and not of plaintiff's right. The efficacy of certain criticisms of the doctrine are illustrated by the case at bar.

Traditionally, State Courts are and should be vested with concurrent jurisdiction: they may and should entertain and dispose of, at one sitting, Federal and State claims. There are, of course, exceptions to this power. One of those exceptions appears to — but in fact does not — exist here: actions brought pursuant to the Exchange Act are to be tried in Federal Courts only.

However, the kind of relief afforded by the Exchange Act is also afforded by the equivalent provision of the Florida Blue Sky Law.[1]/ Therefore, while it is true that a Florida State Court would not have been able to entertain this action, based as it was, upon the Exchange Act, it would have what can be called "effective" concurrent jurisdiction, and it could afford plaintiff the kind of protection afforded by the Exchange Act. The result of the existence of the Florida Blue Sky Law remedy is that the Congressional policy of granting State Courts concurrent jurisdiction over Federal and State claims may be accommodated, and this is proper. Such being the case, it would be an affront to comity for this Court to exercise pendent jurisdiction and entertain the State claim.

More practically, the existence of this so-called "effective concurrent jurisdiction" can potentially resolve another criticism of pendent jurisdiction: if a State Court commits error with respect to Federal law, the injured party has ultimate redress in this Supreme Federal Court, but if a Federal Court commits error with respect to State law, there is no State Court from which the injured party may seek redress. Florida Courts have clearly indicated that the statute of limitations for securities fraud is two years. *Fowler v. Mathony*, 184 So. 2d 676 (4th D.C.A. 1966). Yet, it required a lengthy trial and appeal to establish this proposition in the Federal context.

Moreover, the existence of "effective concurrent jurisdiction" tends to nullify another argument used in

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[1]/ Indeed, the Appellate Court below indicated that Section 517.301(1), F.S.A., is strikingly similar to Section 10b of the Exchange Act. *Cyril M. Hudak v. Economic Research Analysts, Inc. and Richard W. McIntyre*, 499 Fed. 2d 996 (5th Cir. 1974).

support of pendent jurisdiction, namely, that a plaintiff who cannot append a State claim to a Federal cause of action may have to bring a separate law suit in State court to have this relief. The argument fails because a Florida State court could effectively embrace and vindicate both the Respondent's Federal rights (by virtue of Section 517.301(1), F.S.A.) and his State rights (common law fraud). The Plaintiff-Respondent would hardly have to bring a separate law suit in State court to prove common law fraud. He has already done so, and he has a judgment. Ironically, the expense of obtaining this relief was minimal: the judgment was granted by default.

Gibbs, supra, also reminds us that the "whole tendency" of Supreme Court decisions is "to require a plaintiff to try his . . . whole case at one time." The fallacy of this justification for the assumption of pendent jurisdiction may be exposed by theoretical and practical grounds, and both objections to this authority for assuming pendent jurisdiction are epitomized by the case at bar.

The "whole tendency" argument was borrowed from *Baltimore S. S. Co. v. Phillips,* 274 U.S. 316 (1927). Phillips, the plaintiff injured seaman, brought one Federal claim. He prevailed. Later, unsatisfied, he asserted another Federal claim. His second claim was denied, the denial being based upon the conclusion that "second chance" federal litigation was precluded by the doctrine of res judicata. The Respondent in State court sued those persons he felt were primarily responsible for his losses. He, too, prevailed the first time. Now, for reasons he has chosen not to divulge, Respondent wants a second chance. According to *Phillips,* he should not

have it. He has already had his day in court, and he obtained the relief he sought. What difference should it make that he now stands in the Federal orchard to take a second bite of the apple? Since pendent jurisdiction is a creature of equity, it would be incongruous to apply the doctrine here because application of the doctrine would produce an inequitable result by allowing the Respondent to have this second chance.

Therefore, it is suggested that *Phillips* is not good authority for *Gibbs*. *Gibbs* does not implement the basis of res judicata as the same was implemented in *Phillips*. The basis of the doctrine is that a plaintiff must present all his claims (or causes of action, if you will) the first time he sues, because it would be unfair to the courts and society to give him a second chance. *Phillips* invoked res judicata and denied the second claim. *Gibbs* invoked res judicata and entertained what would be the equivalent of the second claim. Based on jurisdictional results, *Phillips* is hardly authority for *Gibbs*. Indeed, if res judicata is to be used in the broadest equitable sense and in the context of power and its rightful exercise, it would seem that *Gibbs-Phillips* ought to preclude pendent jurisdiction in this cause as the Plaintiff-Respondent already obtained relief and should have sued the Petitioners that first time around.

Yet it is also suggested that the flaw in the "whole tendency" argument, as it is based upon the demands of res judicata, is more subtle than mere misreliance upon *Phillips*. The history of the case at bar will reveal this flaw.

What really is significant here is *Phillips*' reference to an exception to res judicata which specifically ad-

dresses itself to jurisdiction and the rightful exercise of the power that superior courts inherently have over lower ones. Respect is a two-way street, and *Phillips* recognizes that res judicata will not bar a claim that a prior court would not hear because it lacked jurisdiction.

The State court would have had jurisdiction to entertain the State claim in Respondent's complaint, the State court did have jurisdiction to entertain that count, and as a practical matter, the State court did give relief for that claim. All potential claims and all potential defendants should have been presented and named, respectively, at that time.

If res judicata will not bar a claim that a lower court would not hear because it lacked jurisdiction, but, if, however, a lower court did have jurisdiction over and did hear substantially the same claim (and afford relief), then it ought to follow that a higher court (here, a Federal court) by virtue of res judicata, should not entertain pendent jurisdiction. Even the exception to the doctrine is not available.

In summary, it is submitted that because the Respondent has already made his claims and made them against all he then thought responsible, and because he is required to try all his claims against all he thinks are responsible at one time, res judicata, as it pertains to pendent jurisdictional concepts, ought to bar Respondent's claim for Florida common law fraud. It is further submitted that the exception to res judicata — that the doctrine will not bar a claim that a prior court could not entertain because it lacked jurisdiction — specifically *precludes* the assertion of pendent

jurisdiction because the prior court did not lack jurisdiction. The relevance of the exception is particularly important because it is an aspect of the doctrine of res judicata — which doctrine, it will be recalled, was a major justification for the enlargement of power asserted in *Gibbs* — that specifically addresses itself to the relationship between res judicata and jurisdiction.

Gibbs also cited to similar provisions of the Federal Rules of Civil Procedure to justify its broad application of federal jurisdiction. One of the leading cases concerned with the joinder of other parties, with compulsory counter-claims, and with cross-claims, when there was original federal jurisdiction over the main claim, is *Moore v. New York Cotton Exchange*, 270 U.S. 593 (1926). *Moore* teaches that Federal courts may assume jurisdiction over these non-federal claims when they arose out of the same "transaction or occurrence" or had a "logical connection", and the reasoning of *Moore* figured strongly in *Hurn v. Oursler*, 289 U.S. 238 (1933).

But is the reasoning in *Moore* sound? Does this reasoning, based on the facts in *Moore*, support a broad approach to pendent jurisdiction. The plaintiff in *Moore* asserted a federal anti-trust claim against the defendant. The defendant counter-claimed with an allegation that the plaintiff violated state law. The Supreme Court entertained jurisdiction over both claims, and in so doing, asserted jurisdiction over a State cause of action (the counter-claim) which could not have been the basis of a Federal law suit, there being no Federal question or diversity jurisdiction. But the cases relied upon in *Moore* stand for the traditional policy that Federal jurisdiction to determine a State

claim over which there would normally not be Federal jurisdiction must be implied when the claim over which Federal jurisdiction does exist cannot be determined without first deciding the State question. *Champion Spark Plug Co. v. Champion Ignition Co.*, 247 F. 298 (Mich. 1917); *Cleveland Eng'r. Co. v. Galion Dynamic Motor Truck Co.*, 243 F. 405 (Ohio 1917); *Xenia Branch Bank v. Lee*, 7 Abb. Pr. 372 (N.Y. Sup. Ct. 1858).

However, the facts in *Moore* indicate that jurisdiction over plaintiff's anti-trust claim could have been and was decided without consideration of defendant's state law counter-claim. Also, *Moore* runs counter to earlier cases denying jurisdiction over counter-claims which did not have to be considered to resolve plaintiff's claim.

Although no counter-claim is involved here, it would not have been necessary for the Federal trial court to first resolve the State question in order to determine if it had jurisdiction over the Federal question. Indeed, the State question had already been determined in favor of the Plaintiff-Respondent, so that entertaining that State question was a waste of judicial resources.

There is, of course, a long line of cases which holds that, after the taking of evidence, a Federal court should not decline to entertain a State cause of action even if the Federal claim which gave rise to jurisdiction has been found wanting. See, e.g., 3A Moore's *Federal Practice*, Paragraph 18.07 (1.-4) and Supplement. Judicial economy, etc., are the reasons advanced in support of this admonition. But, there is also recent case law to the contrary, and this case correctly

emphasizes that the elemental teaching of *Gibbs*, *supra*, is to the effect that pendent jurisdiction is a matter of discretion. *Webb v. Bladen*, 480 Fed. 2d 306 (4th Cir. 1973):

> The district court may exercise its discretion to dismiss State claims at any point during the proceedings. Thus, although the district court should weigh the fact of already completed litigation, it may nevertheless often be proper to dismiss State claims after a trial.
>
> 488 Fed. 2d at 309.

Gibbs itself also advises that dismissal of a State claim after litigation may be merited. 383 U.S. at 727.

The case at bar is a perfect example of why this Court, after a trial on the merits, should find that there is here no Federal jurisdiction and accordingly dismiss the case. Defendants originally suggested to the Trial Court that Plaintiff's claim was barred by the statute of limitations, or alternatively, that the Trial Court should implement a two-year limitations period.

Although no reasons were given in support of the Trial Court's denial of Defendants' Motion to Dismiss, it seems a fair inference that the Motion was denied because the Trial Court did not know when the fraud was discovered, or when, in the exercise of due diligence, it should have been discovered. The absence of this information therefore necessitated a full trial. In short, the only way Defendants could possibly properly present their statute of limitations defense to the Trial Court was at or after trial.

However, since the Federal cause of action here was found to be barred by the two-year statute of limitations, this case has resolved itself into what is essentially a State claim for common law fraud which ought to be tried in State Court. With respect to the argument that such a conclusion would be hindsight adjudication and would render the entire Federal court trial an exercise in futility, with respect to the argument that such a conclusion — which ought to result in a dismissal of this law suit — would be uneconomical, unfair, and inconvenient, Petitioners respectfully suggest to the Court that the situation and result are of Respondent's own making. He brought a law suit in State Court to recover his loss, he obtained his judgment, and by renewing this claim in Federal court, he is the person who created the uneconomical, unfair, and inconvenient situation which exists now. Dismissal of this law suit would not prejudice Respondent since he already has a judgment. Worse yet, affirming the opinion below would afford the Respondent potential double recovery, and surely this would not be an equitable result.

Therefore, Petitioners request that since the Federal cause of action has been eliminated, the Court should dismiss the State cause of action on the grounds of lack of jurisdiction. This would be the most appropriate step for the Court to take. The Respondent has a judgment. By bringing the Federal law suit, the Respondent has wasted an enormous amount of judicial resources, money and time. Federal judicial resources are already strained./ The Respondent should not be

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/ See, for instance, The Geographical Boundaries of the Several Judicial Circuits: Alternative Proposals, 487 Fed. 2d.

rewarded for having wasted all this time, and certainly he should not be given potential double relief. His complaint should be dismissed for lack of jurisdiction.

The Court should set an example.

II AGENCY

"A principal is not liable for his agent's tort unless it is 'within the scope of the agent's employment.' *It is not within the scope of the employment if it is done for the agent's purposes only . . .*" (Emphasis supplied). *M. J. Uline Co. v. Cashdan*, 171 F. 2d 132 (DC Cir. 1948); *Park Transfer Co. v. Lumbermen's Mut. Casualty Co.*, 142 F. 2d 100 (DC Cir. 1944). This is the law of Florida, *City of Miami v. Simpson*, 172 So. 2d 435 (Fla. 1965); and it has been so held in the Fifth Circuit, *City of Green Cove Springs v. Donaldson*, 348 F. 2d 197 (5th Cir. 1965), and *Collazo v. John W. Campbell Farms, Inc.*, 213 F. 2d 255 (5th Cir. 1954).

Since Respondent asserted the agency, the burden was on him to prove it. *Bogue Electric Mfg. Co. v. Coconut Grove Bank*, 269 F. 2d 1 (5th Cir. 1959). *M. J. Uline, supra*, would seem to require a plaintiff to prove that the tort was done for the principal's purposes. Respondent here did not prove this. In fact, the evidence at trial was clear and unrebutted to the effect that Petersen's dealings with O'Connell were only for his own purposes and personal gain — not ERA's and McIntyre's. Both McIntyre and Petersen testified that Petersen paid McIntyre $3 or $3.50 (McIntyre's cost) per share of Stacey-Gifford stock which had been sold to O'Connell for $6 per share. If anything, McIntyre suffered a loss in the transaction. Certainly, ERA never

received commissions for Petersen's sales to the Plaintiff. Since the torts were for Petersen's benefit only, they were not within the scope of his employment. Therefore, ERA and McIntyre should not be held liable.

The foregoing notwithstanding, it cannot be said that Petersen was clothed with apparent authority. In *Bogue, supra,* the Court defined apparent authority and described the limits of liability attaching thereto. In so circumscribing said limits, the Court warned that the existence of mere "(i)solated or occasional transactions are not enough." *Bogue, supra,* at 5. Respondent has complained of four transactions. There were numerous others before and after Petersen's employment. The fact that O'Connell had dealt with Petersen during that part of 1968 prior to Petersen's registration with ERA — during which time O'Connell knew Petersen was not an agent of ERA — not only tends to isolate those four transactions even more, but tends to rebut O'Connell's claim that he was dealing with an agent of ERA.

Bogue also states that for there to be apparent authority, the third party must change his position in reliance on a representation by the principal that his agent has authority. O'Connell did not change his position after Petersen became an active registered representative of ERA. The pattern established in early 1968 continued throughout the year and into 1969. In other words, O'Connell had dealt with Petersen as an individual *before* Petersen joined ERA, and he continued to deal with Petersen as an individual *after* Petersen joined ERA. All the checks issued for the purchase of the securities giving rise to Respondent's claims, are made payable to Petersen individually.

The fact that some of these checks were endorsed by "Richard F. Petersen & Associates", a business entity obviously different than ERA, and were not endorsed by ERA, would seem to be obvious notice to the Plaintiff that he was not dealing with an agent of ERA. Therefore, a "person of ordinary prudence, conversant with business usages and the nature of the particular business" would hardly be justified in presuming that he was dealing with an agent of another company. *Bogue, supra,* at 3-4. The point is all the more telling in O'Connell's case, because he had worked for a bank. *Cf., United Bonding Ins. Co. v. Banco Suizo Panameno, S.A.*, 422 F. 2d 1142 (5th Cir. 1970), to the effect that a third party cannot rely on an agent's apparent authority if the circumstances are such as would put a reasonable man on inquiry.

Moreover, Respondent continued to buy Stacey-Gifford during 1969 and 1970 privately — that is to say, from an individual (Mr. Stacey, the president of the company) and not a stockholder. It therefore seems a fair inference that he never changed the position he adopted in early 1968. Plaintiff bought Stacey-Gifford from individuals dealing directly with the company and not through stockbrokers.

In the context of the securities world, one of the leading agency cases is *Kamen & Co. v. Paul H. Aschkar & Co.*, 382 F. 2d 689 (9th Cir. 1967), which found that the salesmen involved in a fraud had no real or apparent authority to do what they did. Referring to the Restatement of the Law of Agency, the Court quoted:

> ". . . Any substantial departure by an agent from the usual methods of conducting

business is ordinarily a sufficient warning of lack of authorization."

* * *

. . . Likewise, if the representations are as to a matter concerning which the other party, in view of business customs and other facts which he knows *or should know*, should realize the agent is not authorized to make statements, the principal is not liable for them."

382 F. 2d at 695.

In the case at bar, there were substantial departures from the usual methods of conducting business, and any reasonable man should have been aware of these departures. The checks issued by O'Connell in payment for the securities were made payable to the salesman himself, not to ERA as would have been normal and proper, and they were never endorsed by ERA, as would have been normal and proper. O'Connell did not receive confirmation slips or billing statements from ERA as would have been normal. Again, a reasonable man, especially one who had worked for a bank, claiming he dealt with a brokerage firm, should have realized that the failure to receive this evidence of the brokerage firm's participation in the transactions was a departure from the normal method of conducting business.

Furthermore, assuming that O'Connell knew — as he testified he did — that Petersen was an agent of ERA, he had the duty to determine for himself Petersen's authority to accept checks made payable to himself and not ERA:

"A third person dealing with a known agent may not act negligently with regard to the extent of the agent's authority or blindly trust the agent's statements in such respect. Rather, he must use reasonable diligence and prudence to ascertain whether the agent is acting and dealing with him within the scope of his powers. The mere opinion of an agent as to the extent of his powers or his mere assumption of authority without foundation, will not bind the principal; and a third person dealing with a known agent must bear the burden of determining for himself, by the exercise of reasonable diligence and prudence the existence or nonexistence of the agent's authority to act in the premises. The principal, on the other hand, may act on the presumption that third persons dealing with his agent will not be negligent in failing to ascertain the extent of his authority as well as the existence of his agency."

3 Am. Jur. 2d, Agency 678, P. 482.

State of mind is subjective. A mental conclusion is the result of impressions made upon one by tangible evidence, i.e., by facts. A conclusion in the mind of a third party that he is dealing with an agent can only be reasonable if the facts justifiably support the conclusion. One's beliefs and one's acts should be consistent. Believing that one is an agent but making payment to him in his individual capacity, not as an agent, and not to his principal, is a belief which is inconsistent with one's acts. The belief is not justified by the facts; the conclusion is illogical. *Cf., Ernst Iron Works v. Duralith*

Corporation, 200 N.E. 683 (CA NY 1936), and *Parsons v. Federal Realty Corp.*, 143 So. 912 (Fla. 1931).

If O'Connell thought he was dealing with Petersen as an agent, why did he make his checks payable to Petersen individually and not to ERA? If O'Connell thought he was dealing with Petersen as an agent of ERA, why, when he sued Petersen in the Fall of 1969 did he not sue McIntyre and ERA as well? The irony of the foregoing is, of course, that O'Connell never had an account with ERA, and Petersen explained to O'Connell that these were private transactions wherein he (O'Connell) was dealing with him (Petersen) on a personal basis.

For the foregoing reasons, this Court would only be justified in concluding that since Petersen had neither actual nor apparent authority to act for ERA as he did. ERA and McIntyre are not liable for his tortious acts. The Fifth Circuit erred, as a matter of law, in holding the Petitioners liable for the acts of their agent committed solely for his own purposes and benefit.

CONCLUSION

For the reasons stated, this Petition for Writ of Certiorari should be granted. It would be inappropriate for a Federal Court to entertain pendent jurisdiction, and notwithstanding, as a matter of law, Petitioners should not be held vicariously liable for the acts of their agent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of this Petition for Writ of Certiorari and Appendix annexed thereto were served upon Jeffrey Tew, Esquire, of TEW, TEW & MURRAY, 200 Southeast First Street, Miami, Florida 33131, Counsel for Daniel O'Connell, Respondent, by depositing the same in a United States mail box with first class postage prepaid, addressed accordingly, and in accordance with Rule 33, Supreme Court Rules, this day of November, 1974.

By _____
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